IN THE HIGH COURT OF BOMBAY AT GOA

APPLICATION FOR APPOINTMENT OF ARBITRATOR NO. 11/2005

M/s. Resourceful Earthmovers,
a Partnership Firm registered under
the Indian Partnership Act
having its Office at "Damodar Chambers"
Panaji, Goa represented in this act by
its Partner Mrs. Meena D. Rajani,
r/o. Dona Paula, Panaji, Goa. ..... Applicant.

V/s.

1. Mr. Vishal Vinaeca Bandekar; and

2. Mrs. Vanita Vishal Bandekar,

Both residing at "Bandekar House"
Near Lar Escolar,
Altinho, Panaji, Goa. ..... Respondents.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Braganza, Advocate for the applicant.

Mr. S. G. Desai, Senior Advocate with Mr. S. Kalshawkar, Advocate for the respondents.

CORAM : S.A. BOBDE, J.

DATE : APRIL 13, 2007.

ORAL ORDER :

This is an application for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996. The appointment is

sought under an agreement dated 23.4.1993 between the respondents and the applicant in respect of raising contract pertaining to a mine. Clause of the agreement which provides for arbitration, reads as follows :

> " ARBITRATION
>
> If at any time any dispute or question arises between the MINEOWNER and the DEVELOPERS touching the meaning, construction or effect of this Agreement or of any clause or thing therein, whether express or implied or regarding their respective liabilities and rights under the Agreement or otherwise in relation to the said Mining Lease, then every such dispute, doubt or question shall be referred to arbitration and the Board of Arbitrators shall be constituted of two Arbitrators, one to be appointed by each of the parties shall be governed by the provision of the Indian Arbitration Act, 1940 amended upto the date of its application in this context."

On a plain reading of the clause, it is clear that the clause is wide enough to cover the disputes of interpretation of the agreement and every dispute, doubt or questions which may arise under the agreement.

2. The dispute between the parties is in regard to the agreement and in particular, the amounts received by the respondents from the applicant. According to the applicants, the respondents who are holders of mining concession or lease entered into this agreement for allowing the applicant and their sister concern to raise mining ore and sell it inspite of the fact that

their application for renewal of the mining lease had already been rejected and in fact, a revision was pending against the said rejection. According to the applicant, the respondents did not even inform the applicant about the rejection of their revision application and continued to accept the money under the agreement. The applicant, therefore, claims a refund of an amount of Rs.11,86,000/- with 18 % interest per annum from the date of of their respective payments made to the respondents. According to the applicant, the money has been paid as a result of the misrepresentation made in the agreement.

3. At this stage, it may only be noted that prima facie there is a statement in the agreement vide Part III to the effect that the application for renewal of mining lease is submitted and will be duly complied with by the mining owners i.e. the respondents with the assistance of the developer i.e. the applicant.

4. However, Mr. Desai, the learned Counsel for the respondents has mainly opposed the appointment of an arbitrator on two grounds, namely the ground of limitation and the nature of the contract in question. According to the learned Counsel, the claim is barred by limitation and the contract has become void upon the rejection of the application for revision by the Central Government on 29th January, 1998. Again the applicant ought to have filed

this application within 3 years thereof; not having done so, it is barred by limitation.

5. The question of limitation may be considered first. The applicant's case is that the contract was entered into on 24th March, 1993 and the applicant paid a sum of Rs.11,86,000/- to the respondents. The last payment was made in August, 1998. According to the applicant, in the first place, the respondents misrepresented in the agreement by not disclosing that the government of Goa had refused the renewal of the mining lease on 15.1.90 and 16.1.90. Therefore, the representation in the agreement that the mining lease pending renewal, was incorrect. In fact, according to the applicant, the respondents kept them in the dark about the status of the revision application also. It was only in the last week of August, 2004 on making inquiries at the Office of the Directorate of Industries and Mines, at Panaji that they came to know that final orders had been passed on 29.1.98 and that the revision applications were dismissed. On the other hand, it is the contention of the respondents that the limitation for the claim commenced when last payment was made by the applicant in August, 1998. It was strongly contended on behalf of the respondents that it is not believable that the applicant had no knowledge that the mining leases were rejected when they entered into the agreement since the rejection was gazetted in the official gazette. Further, according to the respondents, if the applicant had

not pointed out anything, there is no explanation how suddenly they got knowledge in the year 2004. Prima facie, it appears from the agreement that there is a representation that the mining lease is pending renewal and not rejected. Having considered this point, I am of the view that, prima facie, this aspect would require a detailed examination by parties and the evidence. It may be possible that the applicant was aware of the status of the mining lease and the status of the revision application or that they came to know of the rejection in the year 2004 as claimed by them. However, that is a fact that will have to be established. In my view, this would be best done before the arbitrator. I, therefore, leave the question open for decision by the arbitrator.

6. As regards the other contention on behalf of the respondents that the agreement became unenforceable and void upon dismissal of the revision application in which there was a prayer for renewal, the issue whether it was a contingent contract is debatable. According to the applicant, the contract was not contingent upon any collateral event. This issue is also substantive in nature and cannot be decided here. Moreover, the arbitration clause is wide enough to admit this controversy.

7. The learned Counsel for the respondents relied on the decision of the Supreme Court in ***SBP & Co. vs. Patel Engineering Ltd., and anr.,*** (2005)8 SCC 618 and in particular paras 37, 38 and 39 thereof for the

proposition that before appointing an arbitrator, the Chief Justice has to look at various aspects of the matter, including the existence of the arbitration agreement and whether it is a live claim. The judgment, however, does not lay down that issues of limitation etc., must be decided before an arbitrator is appointed. Prima facie, there is no bar to the appointment of an arbitrator.

8. The applicant has already chosen Dr. Alvaro de Noronha Fereira, Retired District Judge, Panaji, Goa as an arbitrator. The respondents have proposed the name of Shri Ajit J. Agni, retired Presiding Officer, Industrial Tribunal cum Labour Court, Panaji, Goa. The said name is accepted. The two arbitrators are directed to appoint the third arbitrator and enter upon arbitration thereafter.

S.A. BOBDE, J.

ssm.